

Slow progress on EU privacy programme

By the end of this year, we had expected to see decisions on simplified notification rules and Binding Corporate Rules. Although progress has been made, the results achieved so far do not offer any immediate help to businesses. **Laura Linkomies** explains why.

The working group will discuss the matter in its next meeting'... 'The Commission will analyse the results in 2005'. These are the fairly typical responses you get from the European Commission when enquiring about progress with its data protection work programme. In the Spring of 2003, the Commission published results from an extensive review into the implementation of the EU Data Protection Directive. The review highlighted a number of problematic areas such as inadequate enforcement by national regulators, a lack of harmonisation between member states' data protection laws and the need to promote a more business-friendly approach to compliance.

As a result, the Commission launched a 'Better Implementation' work programme with a view to reaching certain milestones by the close of 2004. But, in terms of practical advice or concrete measures to help compliance, very little to date has been achieved.

The EU Data Protection Working Party, an advisory body to the Commission, has been tasked with carrying out a large slice of the tasks outlined in the Commission's work programme. In a strategy paper published this September, the Working Party identified its key targets for the short term; most notably improvements to national notification systems and Binding Corporate Rules (see next page).

However, the Working Party has also stressed that its agenda is still open, and will continue to raise issues and make recommendations on its own initiative as it has done in the past (for example with the Microsoft Net Passport authentication system).

Notification still a hot potato

The EU Commission is committed to simplifying the notification process (the requirement for organisations to register their data processing activities with national data protection authorities) across the EU. Currently, a subgroup to the Article 29 Working Party, which met on November 10th, is continuing its work on a public document which is yet to be adopted by the whole group.

Ruth Boardman, Partner at UK law firm Bird & Bird, is keen to see a conclusion to the project. "Ideally, there would be a standard notification procedure across all member states. At present, clients often find it surprising, and confusing, to have to look into quite different procedures in different countries."

Anne-Marije Fontein, a member of the subgroup representing the Netherlands Data Protection Authority explains that even after the decision has been taken on how to proceed, there

If the Working Party does not manage to produce effective results, the Commission is prepared to take action. Eventually, changes to national laws may be required. As a result, companies would be ill advised to expect to benefit from simplified notification rules until the end of 2005 at the earliest.

No action on implementation

One of the areas identified in the work programme is the incorrect and uneven implementation of the directive. Although no concrete action as yet has been taken to rectify the situation, the Commission has launched an investigation into the UK's Data Protection Act.

The Commission is believed to be critical of the UK's enforcement powers as well as the Information Commissioner's policy on international data transfers. Its apparent view is that transfers should be subject to more prior authorisation. Additionally, the Commission disagrees with the UK's

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will still be delays because of all the legislative and technical issues that will have to be addressed.

There have been discussions on using a common notification form, but according to Fontein, it is too early to say which route the Working Party will take. "The discussions have also centred on exchanging information on best practices on notification at the national level, and the use of more exemptions," she adds.

new and significantly narrow interpretation of what constitutes 'personal data' This interpretation, which stems from the *Durant v Financial Services* appeal case in 2003 (see *PL&B UK*, November/December 2003, p.1), has wide implications for the scope of subject access requests.

"The UK had until 9th October to respond to the enquiry. I believe a response has been received, but neither

the EU Commission or the UK Government have made this enquiry public," says Rosa Barcelo of the Commission's Internal Market division. "Other member states may also be approached regarding their incorrect implementation of the Data Protection Directive. The Commission has had bilateral talks with the new member states [from Central and Eastern Europe], and as a result, some will have to make changes to their laws. The ten new member states have, however, just implemented their current laws, so infringement procedures would

meeting at the end of November. So far, no plans have been made public.

ICC clauses close to adoption

One major achievement has been work on alternative contractual clauses drafted by the International Chamber of Commerce (ICC). After long negotiations, the clauses were finally approved by the Article 31 Working Party (government representatives of EU Member States) in October and are expected to be approved by the European Parliament by the end of this year (see p.7).

players together to discuss possible ways forward. The task is not helped by the fact that the Working Party has now incorporated the ten new EU accession countries, and will most likely need more time for its deliberation.

But will BCRs eventually be of any use to companies if decisions on individual schemes take months to approve? Ruth Boardman thinks they will be useful. "The alternative solutions are extremely difficult for large multinationals to implement, so I think there is a real willingness by this type of organisation to persist with BCRs."

Improving administration

Faster decision-making is needed in general, but especially in terms of using binding corporate rules. The Working Party may have to revise its cooperation procedures and delegate its powers to smaller sub groups.

Peter Schaar, Chair of the Working Party, indicated at *Privacy Laws & Business' Annual Conference* in July that majority voting could be an option, but that he would prefer other alternatives. "The group has produced 100 common positions in the last eight years, but is that efficient?" he said.

The group has already set up an Intranet to facilitate the decision-making process by allowing members to exchange information in a speedy manner before the plenary sessions take place. The Working Party has also agreed that not all topics on its agenda need to be adopted as written opinions. In some cases, it may be sufficient to express the common view of the Working Party in letters to the institutions concerned, or to publish press releases.

It is likely that the group will address decision-making procedures, and other issues discussed in this article in its next meeting on November 25-26th 2004.

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FURTHER READING:

Details on the European Commission's data protection work programme can be found via the Internal Market website: http://europa.eu.int/comm/internal_market/index_en.htm

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not be applicable there at this point," she continues.

Should the Commission be dissatisfied with the UK's response to its enquiry, the government may be required to amend its current law or face prosecution in the European Court of Justice.

Ruth Boardman would like to see a different approach being taken. "I think there should be more emphasis first on trying to get the existing law enforced and taken account of. If the Commission persuades all member states to implement - in its view - correctly, but the legislation is not enforced, this seems of little benefit."

Sectoral investigations

The Article 29 Working Party has considered launching sectoral investigations at the EU level, with a view of giving practical guidance to the sectors concerned. However, no investigations have so far been launched. While Commission representatives acknowledge the usefulness of this approach, they have stressed that the decision is not in their hands.

In its recent strategy paper, the Working Party highlights the need for stronger enforcement powers. As a result it has set up a sub group to deal with the issue, and a draft declaration has been prepared. The declaration, which deals with synchronised European-wide enforcement measures, will be discussed at the group's plenary

But despite this success, few industry groups have been willing to push forward their own initiatives or submit sectoral codes of practice for approval. Even Commission officials admit that while self-regulation is encouraged, the administrative hoops that organisations have to go through are causing problems. "One of the most disappointing aspects of the work programme is that no new proposals have been made for codes of conduct," says Leonardo Cervera Navas of the Commission's Data Protection Unit. "Part of the problem is that because the process takes so long, organisations may be discouraged from drafting codes."

While the Commission encourages associations in its statements and private talks with organisations to produce codes, there is no formal mechanism to push them forward. The time involved in the negotiations stage could, however, be cut by better drafting, but also by speeding up the oversight process carried out by the Working Party, which is responsible for scrutinising the codes.

Binding Corporate Rules

Much work has been done on binding corporate rules (BCRs) - a scheme that permits intra-group data transfers through internally binding codes of conduct - but there are still differences of opinion between Data Protection Commissioners on how to proceed. A hearing at the end of November by the Article 29 Working Party will bring key